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July 24, 1991

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**Opinion Committee**

Honorable Dan Morales  
Attorney General of Texas  
Supreme Court Building  
Austin, Texas 78711-2548  
Attn: Ms. Madeleine Johnson  
Chairperson - Opinions Committee

**RE: Application of Section 232.001 of the Local Government Code**

Dear General Morales:

Pursuant to the provisions of Section 402.43 of the Texas Government Code, I hereby request an opinion from the Attorney General with regard to the following questions which have arisen in El Paso County, Texas.

**A. Questions Presented In Brief**

1. If a tract of land in El Paso County was divided into five-acre and one-acre tracts during the 1960's, when there was no obligation to file a subdivision plat for subdivisions, and no such plat was filed, can a purchaser of one or more of the tracts now

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FILED SEPARATELY**

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resell one or more of the tracts without complying with the current plat requirements of Chapter 232 of the Local Government Code?

2. May a successor-in-interest to the original developer's remaining unsold tracts now resell one or more of such tracts without complying with the current plat requirements of Chapter 232 of the Local Government Code?

3. Would easements created from a common source of title and "reserved unto the general public for road purposes" terminate where there has been subsequent merger of ownership and no acceptance or use of easements?

4. What is meant by the term "subdivision" in Section 5 of Acts 1983, 68th Leg., ch. 327, which exempts a "subdivision ... from which one or more lots was conveyed by a metes and bounds description and for which no subdivision plat was filed before September 1, 1983."?

#### **B. Statement of Facts**

During the 1960's, certain sections of land located in El Paso County, but outside the limits of the City of El Paso and its extraterritorial jurisdiction, were divided by developers into five-acre and one-acre tracts (herein "tracts"). Separate property tax identification numbers were obtained for each tract, though no subdivision plat showing the separate tracts was ever filed of

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record with the County Clerk. The developers reserved easements of twenty feet on all four sides of each tract. These easements were reserved "unto the general public for road purposes" and for "the placement, maintenance, and operation of public utilities". As a general rule however, none of the easements were ever utilized, developed, or accepted for public use or utilities. (Sample sales agreements, deeds, and illustrations are attached for reference and are marked "Exhibit A".) Developers then sold the tracts to various purchasers. Some purchasers obtained individual tracts while others acquired large blocks of tracts.

Original purchasers and other successors-in-interest are now seeking to resell these tracts both individually and in blocks of varying sizes, without filing a plat or meeting any other current requirements for subdivisions. For purposes of this opinion, it is assumed that no purchaser is seeking to further subdivide a tract into smaller units requiring roads, alleys, streets, etc.

### C. Discussion

During the 1960's, three statutes were applicable to the regulation of subdivisions in El Paso County. The first statute was Vernon's Ann. P.C. art. 1137h, (Acts 1931, 42nd Leg. p 266, ch. 160). In part it mandated that a subdivision map or plat could not be recorded in the official County Clerk records:

"...without first securing approval therefore as may be provided by law and no party so subdividing or

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resubdividing any real estate shall use the subdivision's or resubdivision's description in any deed of conveyance or contract of sale delivered to a purchaser unless and until the map and plat of such subdivision shall have been duly authorized as aforesaid and such map and plat thereof has actually been filed for record..."

Article 1137h however, did not require a plat to be filed for subdivisions nor provide specific guidelines for approval by Commissioners Court.

A second somewhat similar provision was found in Art 6626 (Acts 1931, 42nd Leg., ch. 217) which provided that:

"...in cases of subdivision or re-subdivision of property no map or plat of such subdivision or re-subdivision shall be filed or recorded unless and until the same has been authorized by the Commissioners Court..."

Once again, however, there was no specific requirement that a plat be filed in the event of subdividing. Thus, at the time in question, the sale of the tracts did not appear to directly contravene the provisions of Article 6626.

Article 6626 was repealed in 1983 and enacted as Section 12.002(a) of the Texas Property Code. In 1987 the Property Code was amended to add a new Section 12.002(c), transferred from former Article 6626c, which provides:

"[a] person who subdivides real property may not use the subdivision's description in a deed of conveyance or contract of sale ... unless the plat or replat of the subdivision is approved and filed for record." (Acts 1987, 70th Leg., ch. 149, sec 22.)

A third statute applicable in El Paso County in the 1960's, was former Article 2372K (Acts 1951, 52nd Leg., ch. 151). Article 2372K permitted commissioners courts in counties having a population of not less than 190,00, the discretionary authority to require subdividers to comply with certain road or street regulations. It further authorized such courts to refuse to approve or authorize maps or plats of such subdivisions upon failure to comply with any reasonable specifications promulgated under the Act.

El Paso County did not formally adopt subdivision regulations until September 9, 1974. Moreover, it is unclear whether the County's regulations actually required plats to be filed or merely set permissive guidelines for those wishing to file subdivision plats. For example, the introduction to the County's 1974 Regulations states that the prime purpose of the Regulations was:

"... to regulate the subdivision of land and provide a basic meter by which minimum requirements and standards can be observed and enforced." Subdivision Regulations of El Paso County, Texas, p.i.

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The Regulations further stated that:

"All maps or plats proposing to subdivide, layout [sic], or amend previous maps laying out real estate within the County of El Paso, shall require consideration and approval by the County Planning Commission. The division of any parcel of land into two or more lots or sites in such a way as to create one or more new streets or public right of way shall constitute a subdivision." Id. p.2

Thus, even if a sale of five-acre parcels reserving easements for access constituted a "subdivision," see Op. Tex. Att'y Gen. No. JM-781 (1987) (sale by metes and bounds with a "private road" probably constitutes a subdivision), it was unclear as to whether a plat was required.

Another statute in existence at the time, but inapplicable to El Paso County because of a population bracket law provision, was former Article 6626a, (Acts 1957, 55th Leg., ch. 436). It required subdividers in counties containing a population of less than 100,000 (later amended to less than 190,000) to file a subdivision plat in the event of subdivision of property.

In 1983 former Articles 2372K and 6626a were combined into the County Road and Bridge Act, (Acts 1983, 68th Leg., ch. 288.) The same Legislature made it mandatory for all "subdividers" to file subdivision plats, regardless of county size. (Acts 1983, 68th Leg., ch. 327) However, Section 5 of this bill contained a

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"grandfather" clause which provided that former Articles 6626a and 2372K as they existed immediately before September 1, 1983 and the requirements adopted under those prior laws:

"apply only to a subdivision of land for which a plat was filed before September 1, 1983 or from which one or more lots was conveyed by a metes and bounds description and for which no such division plat was filed before September 1, 1983." (Acts 1983, 68th Leg., ch. 327, sec. 5)

In this context, it appears that the term "subdivision" means "development" or subdivided tract of land.

In 1987, the county subdivision provisions were incorporated into the Local Government Code. (Acts 1987, 70th Leg., ch. 149) The 1987 codification omitted the "grandfather" clause of the 1983 enactment.

In 1989, Chapter 232 was further amended to add certain additional restrictions to specified counties, ("affected counties") such as El Paso, which are contiguous to an international border or meet certain conditions. (Acts 1989, 71st Leg., ch. 624., sec. 3.04) Section 4.02 of this same law also contained a "grandfather" clause which provided that changes to the subdivision laws "apply only to a subdivision of a tract of land and to an owner of the tract if the tract is subdivided on or after September 1, 1989."

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Recently, section 232.001, Local Government Code was amended again by adding Subsection (f) to read as follows:

"(f) In a county that is an affected county as defined by Section 16.341(1), Water Code, the owner of a tract of land located outside the limits of a municipality who divides the tract into two or more parts to lay out suburban lots or building lots for resale of five acres or less must have a plat of the subdivision prepared. (Emphasis added.) " A division of a tract under this subsection includes a division regardless of whether the division is made by using a metes and bounds description in a deed of conveyance or in a contract for deed, by using a contract of sale or other executory contract to convey, or by using any other method. A plat required under this subsection is subject to the requirements of this section." (Acts 1991, 72 Leg., Senate Bill No. 1189, sec. 8) (Effective Sept. 1, 1991)

Once more the "grandfather" provision was omitted from the amending bill.

As noted above El Paso did not have a county subdivision order during the 1960's and early 1970's and its 1974 subdivision order did not clearly appear to require plats to be filed. Subdivisions in El Paso County prior to 1983 were governed by former Article 2372K which was permissive. After 1983 El Paso has required plats



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for new subdivisions.

The developers in question did not file a subdivision plat at the time of sale nor has one been filed to date. The original developers or their successors-in-interest are now seeking to resell the original tracts both individually and in blocks of varying size without filing a plat or meeting any other requirements for subdivisions. They believe that, to the extent that any tract can be traced back to a common tract of land or development which was subdivided by metes and bounds descriptions, any sale or resale in a development would not constitute a "subdivision" or "re-subdivision". It would therefore seem to follow that a purchaser who acquired more than one tract in the same development from the original developer could resell them individually or as a whole without acting as a subdivider, whether or not the tracts were contiguous or non-contiguous. See: Op. Tex. Att'y. Gen. No. JM-1100 Chapter 232 is not triggered unless there is division of a tract and the division also involves the laying out of streets, alleys, parks, etc.).

The County believes, however, that because most easements were not ever utilized, developed, or accepted for public use; many of these easements have now merged into single owners, and in light of the County's status as an "affected" county, the easements are no longer effective. See, e.g., Hidalgo County Water Control and Improvement Dist. No. 16 v. Hippchen, 233 F.2d 712 (5th Cir.

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1956)(An owner cannot reserve to himself an interest in property already owned in fee by him.) Hence, any sale or resale of these tracts, would currently constitute a "subdivision" and certainly after September 1, 1991.

Therefore, based on these facts, several questions have arisen with respect to these tracts:

(1) The first question is: may an individual purchaser resell one or more such tracts without complying with the current plat requirements of Chapter 232 of the Local Government Code?

(2) A related question is: may the original developer or a successor-in-interest to the original developers unsold tracts now resell one or more such tracts out of the same parcel of land reserving prior easements, without complying with current plat requirements of Chapter 232? The remaining lots, which are a both "checkerboard" of tracts as well as large parcels, were conveyed by deed describing each remaining tract separately.

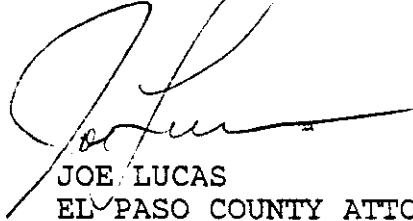
(3) Would easements created from a common source of title and "reserved unto the general public for road purposes" terminate where there has been subsequent merger of ownership and no acceptance or use of such easements?

(4) What is meant by the term "subdivision" in Section 5 of Acts 1983, 68th Leg., ch 327, which exempts a "subdivision... from which one or more lots was conveyed by a metes and bounds

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description and for which no subdivision plat was filed before September 1, 1983? The undersigned hereby requests an opinion from your office on the foregoing issues at your earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joe Lucas", written over the typed name.

JOE LUCAS  
EL PASO COUNTY ATTORNEY  
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El Paso, Texas 79901  
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